A

Malaysia Airports Sdn Bhd v APFT Land Sdn Bhd

B HIGH COURT (SHAH ALAM) — SUIT NO BA-22NCVC-520–09 OF 2017
MOHD SHARIFF JC
21 FEBRUARY 2018

C *Civil Procedure — Summary judgment — Admission of liability — Plaintiffs sued defendants for breach of contract — Plaintiff applied for summary judgment — Whether defendant admitted liability — Rules of Court 2012 O 18*

D *Contract — Agreement — Concession agreement — Breach — Application for summary judgment — Admission of liability in correspondence — Whether defendant admitted liability — Whether parties could claim benefits contained in letter of offer — Whether parties bound by letter of offer — Whether defence raised triable issue*

E

The plaintiff had awarded the defendant a concession over a piece of land to carry out maintenance, repair, overhaul and aircraft services over a period of 15 years starting from 1 January 2013. However, the defendant failed, refused and/or neglected to pay the concession fee to the plaintiff since 1 January 2013. F By a letter dated 10 January 2017, the plaintiff had requested the defendant to settle the amount outstanding but the defendant refused. Following that, the plaintiff had given notice of its intention to terminate the said concession effective 1 March 2017. The defendant also had to surrender vacant possession of the concession area and settle all sums due by 31 March 2017. The G defendant then sent a letter on 6 March 2017 informing that they would make settlement of the amount overdue by 31 July 2017. Further to a meeting on 7 March 2017, the defendant requested the plaintiff to withdraw the said notice of termination and that it be given until 31 July 2017 to settle all the sums due to the plaintiff. The defendant assured the plaintiff that if it failed to H settle the sums due by 31 July 2017, it would vacate the concession area and surrender it back to the plaintiff. The aforesaid request and assurances given by the defendant to the plaintiff at the said meetings were confirmed by the defendant in its letter dated 15 March 2017. However, the plaintiff did not accede to the defendant's requests and affirmed its notice of termination. On I 21 April 2017, the plaintiff informed the defendant that the concession had been terminated and that it would seek to recover vacant possession of the concession area from the defendant. Despite the termination of the said concession on 31 March 2017, the defendant remained in occupation and was holding over possession of the concession area. The defendant also failed to

settle the sum of RM1,144,573.81, which was due and payable to the plaintiff. The plaintiff then filed a suit in the court claiming for the delivery of vacant possession of the concession area, the outstanding sum of RM1,144,573.81 as at 31 March 2017, further late payment charges at 12% per annum on the principal sum of RM952,054.34 from 1 April 2017, double rental from 1 April 2017 onwards and costs and interest of 5% per annum on costs from date of judgment. Subsequently, by way of a notice of application dated 14 November 2017, the plaintiff sought summary judgment under O 14 r 1(2) of the Rules of Court 2012. In resisting the summary judgment, the defendant submitted, inter alia, the following points: (a) the deponent of the plaintiff's affidavits had no personal knowledge of the dealings between the parties at the relevant time; (b) the plaintiff failed to fulfill its obligation under the agreement thereby breached the said arrangement including the said undertaking; (c) all recent letters from the defendant to the plaintiff were issued for the purposes of global settlement and therefore without any admission of liability and in any event, were inadmissible; and (d) the plaintiff was not entitled to double rental on the basis of the non-binding concession agreement.

Held, allowing the plaintiff's application for summary judgment with costs of RM5,000:

(1) The defendant had admitted owing monies to the plaintiff and had even gave an assurance to the plaintiff to settle the debt by monthly installments of RM500,000 until full settlement. The judge found that the allegations or issues raised by the defendant in resisting this application was an afterthought. Further, the defendant had never raised any issue with regard to the concession. By his own admissions in the letters, it was obvious that the defendant's defences and allegations were devoid of merit and unsustainable. There were no triable issues (see para 20).

(2) Despite not given Hangar 1, the defendant had elected and accepted to occupy Hangars 2 and 3 without any objection. The defendant had the benefit of possession, occupation and use of that concession area (Hangars 2 and 3) for years. When it came to make payment for Hangars 2 and 3 despite using for years, now and only then the defendant say that it need not have to pay the plaintiff anything because the defendant was not given Hangar 1 as well. The defendant had a choice of either not accepting the concession altogether due to the absence of possession of Hangar 1 or it could accept the concession but just for Hangars 2 and 3 only excluding Hangar 1. In this case, the defendant unequivocally chose to accept the concession of Hangars 2 and 3 only. Having made that election, the defendant could not now resile or withdraw from its choice or election. Having made that election, the defendant was estopped from disputing the binding effect of the Letter of offer dated 18 February 2015 under which it was given the concession

area consisting of Hangars 2 and 3 only. The defendant had taken the benefit of the concession by occupying and using the concession area and could not now deny the terms of that concession (see para 24).

(3) By the defendant's admissions in its letters, the defendant had already admitted its indebtedness to the plaintiff and had agreed to settle the overdue amount for the concession area consisting of Hangars 2 and 3. By their own act, the defendant had led the plaintiff to believe that the concession was proceeding on the basis of the terms in the said letter of offer. By reason of those admissions, the defendant was further estopped from denying its liability to pay the plaintiff's for concession area consisting of Hangars 2 and 3 and the binding effect of the terms contained in the said letter of offer (see para 25).

[Bahasa Malaysia summary

Plaintif telah mengawardkan defendan satu konsesi untuk sekeping tanah untuk menjalankan penyelenggaraan, pembaikan, baik pulih dan perkhidmatan pesawat udara dalam tempoh 15 tahun mulai 1 Januari 2013. Namun, defendan gagal, enggan dan/atau abai untuk membayar yuran konsesi kepada plaintif sejak 1 Januari 2013. Melalui sepucuk surat bertarikh 10 Januari 2017, plaintif telah meminta defendan untuk menyelesaikan jumlah tertunggak tetapi defendan enggan. Selepas itu, plaintif telah memberi notis untuk menamatkan konsesi tersebut berkuatkuasa 1 Mac 2017. Defendan juga terpaksa menyerahkan pemilikan kosong kawasan konsesi dan menyelesaikan semua jumlah yang kena dibayar pada 31 Mac 2017. Lanjutan kepada satu mesyuarat yang diadakan pada 7 Mac 2017, defendan meminta plaintif untuk tarik balik notis penamatan dan diberi sampai 31 Julai 2017 untuk menyelesaikan semua jumlah yang terhutang kepada plaintif. Defendan telah menjamin plaintif jika ia gagal untuk menyelesaikan hutang sebelum 31 Julai 2017, ia akan mengosongkan tempat konsesi dan menyerah balik kepada plaintif. Permintaan dan jaminan yang diberi oleh defendan kepada plaintif pada mesyuarat-mesyuarat tersebut adalah disahkan oleh defendan melalui suratnya bertarikh 15 Mac 2017. Namun demikian, plaintif tidak menyetujui permintaan defendan dan mengesahkan notis penamatannya. Pada 21 April 2017, plaintif telah memaklumkan defendan bahawa konsesi telah ditamatkan dan ia akan mengambil alih pemilikan kosong kawasan konsesi daripada defendan. Walaupun konsesi tersebut telah ditamatkan pada 31 Mac 2017, defendan masih mendudukinya dan memegang pemilikan kawasan konsesi. Defendan juga gagal untuk menyelesaikan jumlah RM1,144,573.81 di mana ia perlu dibayar kepada plaintif. Plaintif telah memfailkan satu tindakan di mahkamah untuk menuntut pemberian pemilikan kosong kawasan konsesi, jumlah tertunggak RM 1,144,573.81 di mana ia kena dibayar kepada plaintif pada 31 Mac 2017, caj-caj pembayaran lewat pada 12% setahun pada jumlah pokok RM52,054.34 pada 1 April 2017, sewa dua kali sejak 1 April 2017 dan kos dan faedah pada 5% setahun pada

tarikh tarikh penghakiman. Seterusnya, melalui satu notis permohonan bertarikh 14 November 2017, plaintif telah memohon penghakiman terus dibawah A 14 k 1(2) Kaedah-Kaedah Mahkamah 2012. Dalam mencabar penghakiman terus, defendan mengemukakan, antara lain, perkara-perkara berikut: (a) afidavit plaintif deponen tidak mempunyai pengetahuan peribadi mengenai urusan-urusan antara pihak-pihak pada masa tersebut; (b) plaintif telah gagal untuk memenuhi obligasinya di bawah perjanjian maka telah melanggar perjanjian tersebut termasuk akujanji tersebut; (c) semua surat-surat daripada defendan kepada plaintif telah digunakan untuk tujuan penyelesaian global dan oleh itu tanpa pengakuan liabiliti dan tidak boleh diterima; dan (d) plaintif tidak berhak untuk menuntut sewa dua kali pada dasar perjanjian konsesi yang tidak mengikat.

Diputuskan, membenarkan penghakiman terus plaintif dengan kos RM5,000:

(1) Defendan telah mengakui hutang duit kepada plaintif dan telah memberi jaminan kepada plaintif untuk menyelesaikan hutang melalui ansuran bulanan RM 500,000 sehingga penyelesaian penuh. Hakim mendapati alegasi atau perkara yang dibangkitkan oleh defendan dalam mencabar aplikasi adalah satu pemikiran terkemudian. Selanjutnya, defendan tidak pernah membangkitkan isu mengenai konsesi. Melalui pengakuan dalam surat-suratnya, ia adalah jelas bahawa pembelaan defendan dan alegasi adalah tidak bermerit dan tidak boleh dikekalkan. Ia juga tidak mempunyai isu yang boleh dibicarakan (lihat perenggan 20).

(2) Walaupun tidak diberi Hangar 1, defendan telah memilih dan menerima untuk menduduki Hangar 2 dan 3 tanpa bantahan. Defendan mempunyai faedah pemilikan, pendudukan dan kegunaan kawasan konsesi (Hangar 2 dan 3) untuk beberapa tahun. Apabila sampai masa untuk membuat bayaran untuk Hangar 2 dan 3 walaupun telah digunakan untuk beberapa tahun, hanya sekarang bahawa defendan berkata tidak perlu untuk membayar plaintif kerana defendan tidak diberi Hangar 1 juga. Defendan mempunyai pilihan untuk tidak menerima konsesi keseluruhan kerana ketiadaan Hangar 1 atau ia boleh menerima konsesi tetapi hanya untuk Hangar 2 dan 3 sahaja dan mengecualikan Hangar1. Dalam kes ini, defendan telah memilih untuk menerima konsesi untuk Hangar 2 dan 3 sahaja. Dalam membuat pilihan tersebut, defendan tidak boleh dilepas atau menarik balik daripada pilihannya. Dalam membuat pilihan tersebut, defendan diestop untuk membantah kesan ikatan surat tawaran bertarikh 18 Februari 2015 di mana ia akan memberi kawasan konsesi mengandungi Hangar 2 dan 3 sahaja. Defendan telah mendapat manfaat konsesi dengan menduduki dan menggunakan kawasan konsesi dan sekarang tidak boleh menafikan terma-terma konsesi tersebut (lihat perenggan 24).

(3) Melalui pengakuan defendan dalam suratnya, defendan telah mengakui keberhutangan kepada plaintif dan telah berjanji untuk menyelesaikan jumlah yang tertunggak untuk kawasan konsesi mengandungi Hangar 2 dan 3. Melalui tindakan mereka sendiri, defendan telah membawa plaintif untuk mempercayai bahawa konsesi adalah berjalan berdasarkan terma-terma surat tawaran tersebut. Oleh sebab pengakuan teresbut, defendan kini diestop untuk menafikan liabilitinya untuk membayar plaintif untuk kawasan konsesi yang mengandungi Hangar 2 dan 3 dan kesan ikatan untuk terma-terma tersebut dikandungi dalam surat tawaran tersebut (lihat perenggan 25).]

Notes

For a case on concession agreement, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reisue) para 3503.

For cases on admission of liability, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 9628–9629.

Cases referred to

Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417; [2000] 2 CLJ 457, CA (refd)

Azlin bin Khalid v Mohamad Najib Ishak and other appeals [2017] 6 MLJ 537, CA (refd)

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ Rep 14, SC (refd)

Boustead Trading v Arab-Malaysian Merchant Bank Berhad [1995] 3 MLJ 331, FC (refd)

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363; [1995] 3 CLJ 690, CA (refd)

Chin Well Fasteners Co Sdn Bhd v Sampath Kumar Vellingiri [2006] 1 MLJ 117; [2005] 4 CLJ 394, CA (refd)

Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal [2006] 1 MLJ 505; [2006] 1 CLJ 996, CA (refd)

Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd [1987] 2 MLJ 332, SC (refd)

Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd [1995] 2 MLJ 153; [1995] 3 CLJ 9, CA (refd)

Malayan Banking Berhad v Red Box (Malaysia) Berhad [2000] MLJU 108, HC (refd)

Microsoft Corporation v Electro-Wide Ltd and another (1997) IP & T Digest 20; (1997) FSR 580, Ch D (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 2 CLJ 220, FC (folld)
South East Asia Insurance Bhd v Kerajaan Malaysia [1996] MLJU 642; [1998] 1 CLJ 1045, CA (refd)
United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206; [1982] CLJ 547; [1982] CLJ Rep 358, FC (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241, FC (refd)
ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd [2014] 10 MLJ 633, HC (refd)

Legislation referred to

Rules of Court 2012 O 14, O 14 r 1(2)

Jasmeet Singh (Balqis with him) (Siew & Jasmeet) for the plaintiff.
D Norendra (Alison with him) (Norendra & Yap) for the defendant.

Mohd Shariff JC:

INTRODUCTION

[1] By notice of application dated 14 November 2017, the plaintiff seeks summary judgment under O 14 r 1(2) of the Rules of Court 2012 (encl 11) in relation to its claim in this proceedings. It claims summary judgment against the defendant for breached the concession contract as stipulated in the letter of offer dated 18 February 2015.

[2] The plaintiff's claim is plain and obvious and the defendant has no defence to the plaintiff's claim and there are not triable issues.

[3] The cause papers for this application are as follows:

(a) notice of application dated on 14 November 2017;

(b) the plaintiff's affidavit in support duly affirmed by Feizal Mohd Noor on 13 November 2017;

(c) the defendant's affidavit in reply affirmed by Dato' Faruk bin Othman on 28 November 2017;

(d) the plaintiff's affidavit in reply duly affirmed by Feizal Mohd Noor on 5 December 2017;

(e) the defendant's affidavit in reply (2) affirmed by Dato' Faruk bin Othman on 22 December 2017;

(f) amended writ of summons dated 8 September 2017;

(g) amended the plaintiff's statement of claim dated 8 September 2017;

(h) amended the defendant's statement of defence and counter claim dated 24 November 2017; and

(i) the plaintiff's amended reply to the statement of defence and amended defence to amended counter claim dated 30 November 2017.

[4] To simplify the above affidavits, the plaintiff is premised on the breached of the concession contract by the defendant as stipulated in the letter of offer dated 18 February 2015 which the plaintiff had given to the defendant, a concession over a piece of land measuring approximately 22,530 sqft for the defendant to carry out maintenance, repair, overhaul and aircraft services at the Light Aircraft Centre located at the Sultan Abdul Aziz Shah Subang Airport. The plaintiff is claiming against the defendant judgment for:

(i) The delivery of vacant possession of the concession area;

(ii) The outstanding sum of RM1,144,573-81 as at 31 March 2017;

(iii) Further late payment charges at 12% per annum on the principal sum of RM952,054-34 from 1 April 2017 onwards;

(iv) Double rental from 1 April 2017 onwards; and

(v) Cost and interest of 5% per annum on costs from date of judgment.

THE ESSENTIAL FACT

[5] Having gone through the pleadings and affidavits filed by the respective parties, I have concluded the facts below:

(a) by a written letter of offer dated 18 February 2015, the plaintiff had given to the defendant, a concession over a piece of land measuring approximately 22,530 sqft for the defendant to carry out maintenance, repair, overhaul and aircraft services at the Light Aircraft Centre located at the Sultan Abdul Aziz Shah Subang Airport;

(b) among the terms of the said concession were:

(i) the period of the concession was 15 years beginning on 1 January 2013–31 December 2028;

(ii) for the period relevant to the plaintiff's claim herein, the defendant was to pay the plaintiff a concession fee of RM18,024 per month calculated at the rate of RM0.80 per sqft; and

(iii) late payment charges at the rate of 12% pa would be payable by the defendant on all overdue payments;

(c) as of 1 April 2015 when the law pertaining to the imposition of GST came into force, the concession fee was increased to RM19,105.44 per month inclusive of GST at the rate of 6% amounting to RM 1,081.44;

(d) the defendant failed, refused and/or neglected to pay the concession fee to the plaintiff beginning 1 January 2013 and by reason thereof, the defendant had breached the concession contract;

(e) by a letter dated 10 January 2017 issued by the plaintiff's solicitors, the defendant had been requested to remedy its default and breach by settling all payments due to the plaintiff. The defendant however failed/refused to settle the amount outstanding;

(f) accordingly, by a letter dated 17 February 2017, the plaintiff gave to the defendant, one month's notice effective 1 March 2017 of the plaintiff's intention to terminate the said concession and for the defendant to surrender vacant possession of the concession area and settle all sums due, by 31 March 2017;

(g) following the issuance of the said notice of termination, the defendant sent a letter dated 6 March 2017 to the plaintiff. In this letter, the defendant had informed the plaintiff that it would make settlement of the amount overdue by 31 July 2017;

(h) also, after the issuance of the aforesaid notice of termination, a meeting was held between the plaintiff and the defendant on 7 March 2017. At this meeting, the defendant requested the plaintiff to withdraw the said notice of termination and that it be given until 31 July 2017 to settle all the sums due to the plaintiff;

(i) the defendant also assured the plaintiff that if it failed to settle the sums due by 31 July 2017, it would vacate the concession area and surrender it back to the plaintiff. The aforesaid request and assurances given by the defendant to the plaintiff at the said meeting were confirmed by the defendant in its letter dated 15 March 2017;

(j) the plaintiff however did not accede to the defendant's requests as aforesaid. The plaintiff instead informed the defendant that the notice of termination was effective, that the defendant must deliver vacant possession of the concession area and settle all sums due, by 31 March 2017. The defendant failed/refused to deliver vacant possession of the said concession area or to settle the amounts outstanding;

(k) the plaintiff by its letter dated 21 April 2017, informed the defendant that the concession had been terminated and that it would seek to recover vacant possession of the concession area from the defendant. Despite the termination of the said concession on 31 March 2017, to date the defendant continues to occupy and is holding over possession of the concession area;

(l) the defendant has also failed to settle the sum of RM1,144,573.81 (consisting of outstanding concession fees, late payment charges and water charges) which is due and payable to the plaintiff; and

(m) wherefore, the plaintiff is claiming against the defendant judgment for:

(i) the delivery of vacant possession of the concession area;

(ii) the outstanding sum of RM1,144,573.81 as at 31 March 2017;

(iii) further late payment charges at 12%pa on the principal sum of RM952,054.34 from 1 April 2017 onwards;

(iv) double rental from 1 April 2017 onwards; and

(v) costs and interest of 5%pa on costs from date of judgment.

THE DEFENDANT'S OPPOSITION TO SUMMARY JUDGMENT

[6] In summary, the defendant resisted the application for summary judgment on the following grounds:

(a) the deponent of the plaintiff's affidavits has no personal knowledge of the dealings between the parties at the relevant time;

(b) the letter of appointment (with respect to all three of the said Hangars)/said arrangement is binding on the parties (including the said understanding and said undertaking) and in any event, the said offer is not binding of the defendant;

(c) the plaintiff failed to deliver Hangar 1 thereby breached the said arrangement including the said undertaking. By bringing this action, the plaintiff also breached the said undertaking;

(d) all recent letters from the defendant and the said other company to the plaintiff were issued for the purposes of global settlement and therefore without any admission of liability and in any event, are inadmissible; and

(e) the plaintiff is not entitled to double rental on the basis of the non-binding concession agreement.

PRINCIPLES GOVERNING O 14 APPLICATION

[7] The principles to be applied in determining whether or not to give summary judgment under O 14 of the Rules of Court 2012 are not controversial. The court may give summary judgment in a plain and obvious case where the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim (see *Bank Negara Malaysia v Mohd Ismail Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627; [1992] 1 CLJ Rep 14, *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363;

[1995] 3 CLJ 690, *United Malayan Banking Corporation Berhad v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206; [1982] CLJ 547; [1982] CLJ Rep 358; and *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417; [2000] 2 CLJ 457).

[8] It is also a settled principle that in an application for summary judgment, the defendant will not be given leave to defend based on mere assertions alone, in *Bank Negara*, the Supreme Court observed:

> ... Under O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. *Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue are not triable ...*

[9] The standard to be applied was eloquently articulated by Laddie J in *Microsoft Corporation v Electro-Wide Ltd and another* (1997) IP & T Digest 20; (1997) FSR 580, where he said at pp 593–594 that:

> ... It is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to that issue is credible. *The Court must look at the complete account of events put forward by both the plaintiff and the defendants and ... look at the whole situation.* The mere fact that the defendants support their defence by sworn evidence does not mean that the Court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate. *If, having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence, the defence is not credible, the court must say so*. It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief ...

[10] In an application for summary judgment, I am also guided by the principles laid down in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 2 CLJ 220 (FC), George Seah FJ stated that:

> ...We think it appropriate to remind ourselves once again that in every application under O 14, the first considerations are: (a) whether the case comes within the order; and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14, the preliminary requirements:
>
> (i) The defendant must have entered an appearance;
>
> (ii) The statement of claim must have been served on the defendant;
>
> (iii) The Affidavit in Support of the application must comply the requirements of Rule 2 of the Order 14
>
> ...

A If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, *these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. This burden then shifts to the defendant to satisfy the Court why judgment should not be given against him* ...

B

[11] Similarly in the case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 (FC), Steve Shim CJ (Sabah and Sarawak) in allowing the appeal has said that:

C ... In an application under O 14 of the RHC, the burden is on the plaintiff to establish the following conditions: (a that the *defendant must have entered an appearance; (b) that the statement of claim must have been served on the defendant; and (c) that the affidavit in support must comply with Rule 2 of Order 14 of the RHC* in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim. Once those conditions are fulfilled, the D burden then shifts to the defendant to raise triable issues. The law on this is trite ...

[12] In the case of *Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417; [2000] 2 CLJ 457, the Court of Appeal states:

E

... In a nutshell, in an application under O 14 made by the plaintiff for summary judgment without trial, the general principles established are that the *plaintiff has to satisfy the court that the defendant plainly and obviously has no defence to the plaintiffs claim or* part of the plaintiffs claim. If the plaintiff is able to satisfy the court, then F summary judgment should be entered in the plaintiffs favour. On the other hand, if the defendant can show that there is a serious conflict of material facts as disclosed in the opposing affidavits, or there is otherwise a triable issue worthy of judicial investigation in the trial of the action, or there is an important and difficult point of law requiring further and mature consideration at the trial, summary judgment should be refused.

G

[13] In the Supreme Court case of *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 MLJ 332, Wan Suleiman SCJ, held:

... What is clear to us is that there appears to be a plentitude of triable issues. It is H trite law that leave to defend must be given unless it is clear that there is no real substantial question to be tried (*Codd v Delap*) or unless there is no dispute as to facts or law which raises a reasonable doubt that plaintiff is entitled to judgment.

[14] In the Court of Appeal case of: *South East Asia Insurance Bhd v Kerajaan* I *Malaysia* [1996] MLJU 642; [1998] 1 CLJ 1045, Shaik Daud Ismail JCA held that:

... It is well settled that if a defendant in an O 14 application succeeds in raising even a single triable issue, *it will not be a fit and proper case to order summary judgment*. It is only in plain and obvious cases where there are no issues to be tried should

recourse be had to O 14. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 CLJ 627 (refd), it was held by the Supreme Court that in an application under O 14 the court has to be satisfied on affidavit evidence that the defence has not only raised an issue, but also that the issue is triable ...

[15] In the recent Court of Appeal case of *Azlin bin Khalid v Mohamad Najib Ishak and other appeals* [2017] 6 MLJ 537 (DBOA/Tab 5), the court held:

It is well established that among the principles applicable for summary judgment is that *if the affidavits filed by a defendant raises one bona fide triable issue, then the suit between the parties should proceed to a full blown trail*. At this stage, the defendants need not prove their defences. All that is required is to raise a triable issue.

[16] In the Federal Court case of: *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241, the court held:

That being the case, it is *not enough for the respondent in answer to the appellant's application* to sign final judgment, to raise an issue, or any issue. He must, however, *raise such issue as would require a trial in order to determine*. In other words, the issue raised must be an arguable issue.

FINDING OF THIS COURT

[17] With the above principles in mind, I turn now to consider the defendant's position.

First issue

Whether the defendant's owed money to the plaintiff under the said concession?

Any payment made?

[18] I have perused all the relevant affidavit including the documents. In the plaintiff's affidavit in support and the affidavit in reply, I noticed that the plaintiff's has tabled all the documentary evidences ie the defendant's letters clearly show their admissions that it owed money to the plaintiff under the said concession and requesting more time to settle the overdue amount. The defendant's has also agreed, failing which to settle the overdue amounts, they would vacate and surrender the said concession area to the plaintiff. In the defendant's letter signed by Dato' Faruk Othman, the executive chairman dated 10 November 2016 (exh F2, p 26 in the plaintiff's affidavit in support dated 13 November 2017) states that:

... 3. *Subang Hangar*

A

> ... As discussed, we would like to request from the Board of Malaysia Airport Sdn Bhd's permission to dispose of the Hangar in Subang to an interested 3rd party. Once *we have obtained the approval in which we will be able to execute the Sale and Purchase Agreement in which the proceeds will be utilized the overdue amount* ...

B

In the same exhibit marked F2 as above at p 28, Dato' Faruk in the letter dated 6 December 2016 which was signed by him had indicated:

> ... 4 ... kindly provide us with the Latest Statement of Account for Subang Hangar. Therefore, *we proposed the following settlement amount payment of RM500,000-00 by 31 December 2016* and subsequently we will be paying *RM500,000-00 monthly until the overdue* amount is fully settled. As a reassurance to MASB (Plaintiff), we will provide postdated cheque until the full settlement of the overdue amount ...

C

D

Again in another letter signed by Dato' Faruk Othman dated 6 March 2017 (exh F5, pp 46–47 in the plaintiff's affidavit in support dated 13 November 2017) states that:

> ... We at APFT Land would appreciate it if MASB could give us until 31 July 2017 or as soon as Bursa and shareholders *approve the restructuring, after which we would be able to make settlement of our overdue amount* ...
>
> ...
>
> We are aware that MASB has been patient with us therefore we seek your kind understanding and tolerance until 31 July 2017 for us to complete our restructuring exercise. We at APFT would like to thank MAHB for your continuous support and understanding during our trying times ...

E

F

Finally, in the next letter signed by the same dated 15 March 2017 (exh F6, pp 49–50 in the plaintiff's affidavit in support dated 13 November 2017) states that:

G

> ... We also confirm that as discussed and as part of the same arrangement, you agree to give us an extension until 31 July 2017 or till the *said exercise (as the case may be) in order to settle the amounts due* by us with regards to the Sultan Abdul Aziz Shah Airport, Subang ...

H

[19] It is to be noted that the above letter dated 6 March and 15 March 2017 were issued by the defendant after the plaintiff had issued a letter of termination on 17 February 2017. On the other hand, the defendant's counsel had submitted that the defendant denies that the said letters are evidence of an unqualified and unequivocal admission to full amounts claimed by the plaintiff. Some of the letters were issued by the said other company mainly with regard to areas in the said other airports rented/concessioned from the plaintiff. In the letters, it is clear that both the said company and the defendant has never agreed to the specific amount claimed by the plaintiff and requested for the

I

latest statement of account. The counsel submitted that the general offer in the letters on a without prejudice basis to the rights of the defendant and the other company. They had submitted the case of: *Malayan Banking Berhad v Red Box (Malaysia) Berhad* [2000] MLJU 108, Abdul Malik Ishak J held:

> ... An admission of a particular fact may either be express or implied. *In whatever form it takes, the admission must be clear and unequivocal* (*Ellis v Allen* [1914] 1 Ch 904 at p 909; *Ash v Hutchinson & Co (Publishers) Ltd* [1936] Ch 489 at p 503; and *Technistudy Ltd v Kelland* [1976] 1 WLR 1042; [1976] 3 All ER 632 (CA)). Thus, if a defendant admits a document but does not admit its full contents, the plaintiff may still succeed by obtaining judgment if the document, on production, clearly establishes and supports the plaintiffs claim (*Barnard v Wieland* (1882) 30 WR 947; *Rutter v Tregent* (1879) 12 Ch D 758; (1884) 28 Ch D 650). There was clear admission on the part of the respondent to the whole debt and the petitioner must not be restrained from advertising the petition. This was my judgment and I so hold accordingly. Lest I be accused of an oversight, the judgment of that brilliant judge — Hashim Yeop A Sani CJ (Malaya) (as he then was) in *Morgan Guaranty Trust Co of New York v Lian Seng Properties Sdn Bhd* [1991] 1 ML] 95 should be put to the fore. In that case, that brilliant judge held that prima facie a creditor is entitled to petition for a winding-up against a company which fails to pay its debt. His Lordship further held that the creditor should not be prevented from pursuing its petition so that the court would be able to consider all the evidence and determine whether it should exercise its discretion to order a winding-up or not ...

In the High Court case of *ZAQ Construction Sdn Bhd & Anor v Putrajaya Holdings Sdn Bhd* [2014] 10 MLJ 633 Mary Lim J held:

> [82] There are extensive deliberations on the significance and effect of an admission in the Singapore Court of Appeal's decision in *Tfiong Very Sumito*, pp 759–765. *At the end of the day, the court remained cautious on the question of admission, that it has to be clear, unequivocal and it must be both on liability and quantum*.
>
> [83] In that decision, the Court of Appeal first acknowledged that even the authors Merkin and Hjalmarsson at p 22 added that an 'admission by a defendant would, generally speaking, be contrary to a finding of a dispute but not every admission would necessarily avoid a stay order'. The court cited the 'attractively concise and oft-quoted statements' found in the decisions of Goh Joon Seng J in the *'The Dai Yun Shan'; owners of cargo lately laden on board the ship or vessel 'Dai Yun Shan' v Owners of and other persons interested in the ship or vessel 'Dai Yun Shan'* [1992] 2 SLR 508 who pragmatically noted that 'so long as the claim is not admitted, a dispute exists'; and Templeman LJ in *Ellerine Bros (Pty) Ltd v Klinger* [1982] 1 WLR 1375 at p 1383 (Ellerine Brothers):
>
> > There is a dispute until the defendant admits that the sum is due and payable ...
>
> [84] It however recognised that with these pronouncements comes 'the converse proposition that where there has been an admission, there is no longer any dispute and the arbitration agreement does not apply. This raises the problem envisaged by Saville J in *Hayter* and Clarke J in *Halki*: that logically, the arbitral tribunal would not have jurisdiction to hear the claim or make an award, and that a mischievous

A and recalcitrant defendant might use precisely the argument that its defence was hopeless to thwart the arbitration. As Saville J perceptively pointed out, the conundrum created by the analysis that the arbitration agreement does not apply to the claim at hand because the defendant has made a clear and unequivocal admission giving rise to often-inevitable summary judgment, is that, by the same token, the arbitral tribunal would have no jurisdiction and the claimant would only be able to commence litigation proceedings.

[20] Having read the content of the above contemporaneous letter in details, *it has now come to my mind that the defendant had admitted owing monies to the plaintiff. The defendant had even gave an assurance to the plaintiff to settle the debt by monthly installment of RM500,000 until full settlement. I hardly find anything of such allegations or issues did the defendant's raised to resist this application*. If any, such issues and allegations raised by the defendant would only occurred after the plaintiff had filed this suit. As such, it is purely an afterthought. To this effect, I would want to quote the case of: *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 at p 408; [1992] 1 CLJ Rep 14 at p 19, Mohd Azmi SCJ:

> In our view, basic to the application of all those legal propositions, is the requirement under O 14 for the court to be satisfied on affidavit evidence that the defence not only raised an issue but also that the said issue is triable.
>
> Under an O14 application, the duty of a j udge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or *is inconsistent with undisputed contemporary documents or other statements by the same deponent* or is inherently improbable in itself, then the judge has a duty reject such assertion or denial, *thereby rendering the issue as not triable.* ... Thus apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable ...

Having heard the submission of both sides, *it is my considered view that the defendant had never raised any issue with regard to the concession. By his own admissions in the letters, it is obvious to me that the defendant's defences and allegations are devoid of merit and unsustainable. They are not triable issues.*

Second issue

The plaintiff only gave possession of two out of three plots under the concession?

The defendant did not sign/execute the letter of offer dated 18 February 2015?

[21] The defendant's counsel had submitted that the plaintiff had breached the letter of appointment and the said arrangement by failing to deliver vacant

possession of Hangar 1 as well as failed to fulfill the said undertaking. In reliance on the expectation of Hangar 1 (and the said undertaking) and at the plaintiff's insistence, the defendant incurred RM5,769,082.36 to develop and construct the Hangar 2 and the Hangar 3 area. Due to the said failure, the defendant could not use the entire area optimally nor was the defendant able to set up the said center. By now claiming the said fee from the defendant, the plaintiff has also breached the said understanding. As such, the purported termination on 31 March 2017 and the subsequent denial of the defendant's access to Hangar 1 are fundamental breaches of the said arrangement by the plaintiff.

[22] The counsel had also submitted that the defendant's relied on the plaintiff's assurance to ultimately deliver Hangar 1 as well as the said undertaking and proceeded to expend a huge amount of money to construct Hangar 2. As such, an estoppel arose in which the plaintiff was bound to fulfill the assurance to deliver Hangar 1 and fulfill the said undertaking, both of which the plaintiff failed miserably to do altogether. There has also been a total failure of consideration on the part of the plaintiff. The plaintiff is now estopped from claiming the full concession fee from the defendant and terminating the said arrangement on the basis of the defendant's non-payment of the same. In view of this the counsel had submitted the case of: *Boustead Trading v Arab-Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331, Gopal Sri Ram JCA stated as follows:

> ... Before we conclude on the law upon the subject at hand, there are two elements of the doctrine of estoppel which we think require clarification and restatement. The first concerns the effect which the *representation or encouragement had upon the mind of the person relying upon the estoppel: the second has to do with the requirement that such a person should have acted to his detriment*.
>
> The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, having undertaken a careful examination of the authorities, we are of opinion that this requirement is not an integral part of the doctrine. All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's acting. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so influenced by the encouragement or representation ... that it would be unconscionable for the representor to enforce his strict legal rights'. (Per Robert Goff J in Amalgamated Investment at p 105 of the report).
>
> Taking now the requirement of detriment, it is quite apparent that in the early development of the doctrine, there are to be found in the judgments of eminent judges statements 'indicating that one who relies upon an estoppel must prove that he relied upon his opponent's conduct and in consequence acted to his detriment.

> And this view had found its way into the equity jurisprudence of Malaysia (see, for example, *Wong Juat Eng v Then Thaw Eu* [1965] 2 MLJ 213). As has been seen, the former requirement, namely, that there ought to have been reliance was exploded by the decisions in Amalgamated Investment, in Taylor Fashions in Societe Italo-Belge (sub nom 'The Post Chaser') and him TengHuan.
>
> We take this opportunity to declare that the detriment element does not form part of the doctrine of estoppel. In other words, it is not an essential ingredient requiring proof before the doctrine may be invoked. All that need be shown is that in the particular circumstances of a case it would be unjust to permit the representor or encouragor to insist upon his strict legal rights. In the resolution of this issue, a judicial arbiter would, when making his assessment of where the justice of the case lies, be entitled to have regard to the conduct of the litigant raising the estoppel. This may, but need not in all cases, include the determination of the question as to whether the particular litigant had altered his position, although such alteration need not be to his detriment ...

[23] In brief, the defendant submitted that the plaintiff is estopped from claiming concession fees and late payment charges as part of the said arrangement. The plaintiff was required to deliver the total space covering the all three of the said Hangars together. The plaintiff also agreed that the defendant would only pay the said fee upon delivery of vacant possession of Hangar 1 as well as the fulfillment of the said undertaking. It was the plaintiff's who urged the defendant to proceed to construct the Hangar 2 area in spite of the above. In reliance on the above, the defendant incurred a huge sum of money to construct Hangar 2 (and the area of Hangar 3). This amounts to 'relying upon the estoppel' and 'have acted to his detriment'.

[24] Having considered the above and upon scrutinise the relevant documents before me, I hardly find anything that the defendant did ever inform the plaintiff that it was not accepting the terms of the said letter of offer. *Despite not being given Hangar 1, the defendant had elected and accepted to occupy Hangars 2 and 3 without any objection. The defendant had the benefit of possession, occupation and use of that concession area (Hangars 2 and 3) for years. When it come to make payment for Hangars 2 and 3 despite using for years, now and only then the defendant say that it need not have to pay the plaintiff anything because the defendant was not given Hangar 1 as well.* Nevertheless, it needs to consider further that the defendant continues to hold over possession of Hangars 2 and 3 without having paid a cent to the plaintiff for this concession area. *It is my considered view that, the defendant had a choice of either not accepting the concession altogether due to the absence of possession of Hangar 1 or it could accept the concession but just for Hangars 2 and 3 only excluding Hangar 1. In this case, the defendant, unequivocally chose to accept the concession of Hangars 2 and 3 only. Having made that election, the defendant cannot now resile or withdraw from its choice or election. Having made that election, I now wish to endorse that the defendant is estopped from disputing the binding effect of the letter*

of offer dated 18 February 2015 under which it was given the concession area consisting of Hangars 2 and 3 only. The defendant had taken the benefit of the concession by occupying and using the concession area cannot now deny the terms of that concession. In the case of: *Fawziah Holdings Sdn Bhd v Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal* [2006] 1 MLJ 505; [2006] 1 CLJ 996, Gopal Sri Ram JCA delivering the judgment of the Court of Appeal (as His Lordship was then):

> [24] *... the right to avoid a transaction carries with it certain limitations. You cannot affirm so much of a transaction as benefits you and seek to avoid that part of it that imposes a burden. You cannot pick and choose. You must either affirm the whole transaction or avoid the whole of it. There is no halfway house ... What the defendant is seeking to do here is to avoid selected parts of the transaction. It is seeking to approbate and reprobate. It cannot do that.*
>
> [25] As for authority, let me first cite from two leading texts. *Halsbury's Laws of England,* (4th Ed, Vol 16 (Reissue)) para 957 at p 844 states:
>
> On the principle that a person may not approbate and reprobate a special species of estoppel has arisen. The principle that a person may not approbate and reprobate express two propositions:
>
> (1) That the person in question, having a choice between two courses of conduct is to be treated as having made an election from which he cannot resile.
>
> (2) That he will be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct, which he has first pursued and with which his subsequent conduct is inconsistent.
>
> [26] Next, *American Jurisprudence*, (2nd Ed, Vol 28) 1966, pp 677–680 states as follows:
>
> Estoppel by acceptance of benefits; estoppel is frequently based upon the acceptance and retention, by one having knowledge or notice of the facts, of benefits from a transaction, contract, instruments, regulation which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions.
>
> As a general principle, one who knowingly accepts the benefits of a contract or conveyance is estopped to deny the validity or binding effect on him of such contract or conveyance.
>
> This rule has to be applied to do equity and must not be applied in such a manner as to violate the principles of right and good conscience. (Emphasis added.)
>
> [27] In *Verschures Creameries v Hull & Netherlands Steamship Co Ltd* [1921] 2 KB 608*, Scrutton U said:*
>
> A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid,

A and then turn around and say it is void for the purpose of securing some other advantage. *That is to approbate and reprobate the transaction.*

That is precisely what the defendant is seeking to do here ...

B **[25]** On the next issue in which the defendant alleged that they did not sign the letter of offer dated 18 February 2015. Having regard to this, I must weigh the situation in which the defendant had acquiesced and/or had acted in accordance with those terms. *By the admissions in its letters as quoted above, the defendant had already admitted its indebtedness to the plaintiff and had agreed to*
C *settle the overdue amount for the concession area consisting of Hangars 2 and 3. By their own act, the defendant had led the plaintiff to believe that the concession was proceeding on the basis of the terms in the said letter of offer. To my mind, by reason of those admissions, the defendant is further estopped from denying its liability to pay the plaintiff's for the concession area consisting of Hangars 2 and 3 and the*
D *binding effect of the terms contained in the said letter of offer*. In the case of: *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153; [1995] 3 CLJ 9 (CA), Mahadev Shankar JCA delivering judgment of the Court of Appeal held that:

E ... [2] The contention of the appellant that because it had not dated or signed the sale and purchase agreement, there could not therefore be a concluded contract, cannot be sustained. *The true position is that where a contract has been signed by one party it can been forced where there is evidence that the other party has elected to be bound by it ...*

F

[26] Similarly in the case of *Chin Well Fasteners Co Sdn Bhd v Sampath Kumar Vellingiri & Ors* [2006] 1 MLJ 117; [2005] 4 CLJ 394 (CA), Augustine Paul FCJ delivering for the Court of Appeal:

G ... [2] Since the defendant had agreed to the terms of the contract of employment and *had benefitted from it* by its use to obtain the release of the plaintiffs, *the defendant was bound* by it even though the contract of employment was *not signed* by the plaintiffs ...

H CONCLUSION

[27] In the light of the foregoing and in the upshot, after hearing the submission by both parties, the points made by the defendant in its affidavit has no substance or afford it a defence or constitute a triable issue. Accordingly,
I I allow the plaintiff's application for summary judgment and costs of RM5,000 to the plaintiff.

Plaintiff's application for summary judgment allowed with costs of RM5,000.

Reported by Lee TJ